

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 16, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 99-171-R
	:	KENT 99-172-R
EXCEL MINING LLC	:	KENT 99-173-R

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

Pursuant to Commission Procedural Rules 73 and 74, 29 C.F.R. §§ 2700.73<sup>1</sup> and 2700.74,<sup>2</sup> the International Chemical Workers Union Council (“CWU”) has filed a motion to

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<sup>1</sup> Commission Procedural Rule 73 provides, in pertinent part, that a motion to intervene shall set forth:

- (a) A legally protectible interest directly relating to the property or events that are the subject of the case on review;
- (b) A showing that the disposition of the proceeding may impair or impede his ability to protect that interest;
- (c) The reasons why the movant’s interest is not adequately represented by parties already involved in the proceeding; and
- (d) . . . [an explanation] why the movant’s participation as an amicus curiae would be inadequate.

29 C.F.R. § 2700.73.

<sup>2</sup> Commission Procedural Rule 74 provides, in pertinent part:

- (a) After the Commission has directed a case for review, any person may move to participate as amicus curiae. . . . A motion for participation as amicus curiae shall set forth the interest of the

intervene or, in the alternative, to participate as amicus curiae, together with its brief in support of the Secretary of Labor's request to reverse Administrative Law Judge Gary Melick's decision in the above-captioned proceedings. Upon consideration of the motion, we deny the CWU's motion to intervene, grant its motion to participate as amicus curiae, and accept the CWU's amicus brief.

As grounds for its motion, the CWU states that it has been involved in *Asarco, Inc.*, 20 FMSHRC 1001, 1004-08 (Sept. 1998), *pet. for review docketed*, No. 98-4234 (6th Cir. Oct. 16, 1998), at each stage of those proceedings, and that our decision in the instant matter may have an impact upon its chances for success in *Asarco*. Mot. at 2. The CWU explains that its position in the above-captioned matter is not represented by either party. *Id.* The CWU also states that, since it concurrently submitted its brief regarding the proper interpretation of the applicable section of the Mine Act, granting its request to intervene should not unduly delay these proceedings or prejudice any party. *Id.* at 3. Finally, the CWU submits that it did not intervene before the judge because it learned about these proceedings on January 26, 2000, 32 days after the Commission had directed review of this matter. *Id.* at 2.

Excel Mining LLC ("Excel") opposes the CWU's motion. Excel submits that the CWU's motion to intervene was filed out of time, and that the CWU has offered no reason that might constitute "good cause" to excuse the late filing. Opp'n at 1. Excel maintains that the CWU lacks the requisite interest in this matter, and that granting the CWU's motion would prejudice Excel because it would have to refute the CWU's argument, which was not made before the judge. *Id.* at 2-3. Excel also claims that the CWU's motion to participate as amicus curiae should be rejected because the CWU's position does not support one of the parties to the case, because the CWU has no direct interest in this case, and because Excel would be prejudiced in that granting this motion would require an extension of time for Excel and the Secretary of Labor to respond to the CWU's arguments. *Id.* at 3-4.

The procedure for intervention under Commission Procedural Rule 73 requires, inter alia, that the moving party set forth a legally protectible interest directly relating to the case on review, and explain why its participation as an amicus curiae would be inadequate. The issue in the underlying proceeding is whether Section 202(f) of the Mine Act, 20 U.S.C. § 842(f), permits the Department of Labor's Mine Safety and Health Administration to measure silica-bearing dust in coal mines using multiple samples taken over a single shift. 21 FMSHRC 1401 (Dec. 1999) (ALJ). We have held that the legal basis for rejecting the use of single-shift sampling in coal

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movant and show that the granting of the motion will not unduly delay the proceeding or prejudice any party. . . . (b) The brief of an amicus curiae shall be filed within the initial briefing period (*see* § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports. . . .

29 C.F.R. § 2700.74.

mines does not apply to metal/non-metal mines. *Asarco, Inc.*, 17 FMSHRC 1, 5 (Jan. 1995). Therefore, under Commission precedent, the holding in the underlying matter here will not have a direct effect on the outcome of the *Asarco* matter currently pending before the Sixth Circuit, which involves single-shift sampling in a metal/non-metal mine. *Asarco*, 20 FMSHRC at 1002. Moreover, the CWU has made no showing that it represents any miners in the coal industry. Thus, the CWU's stated interest in enhancing its chances for success in *Asarco* is insufficiently direct to satisfy the requirements of Rule 73(a). Furthermore, the CWU has made no showing why its participation in this matter as amicus curiae would be inadequate. Accordingly, we deny the CWU's motion to intervene.<sup>3</sup>

The CWU's alternative motion to participate as amicus curiae raises a timeliness issue. We recently amended Rule 74 to clarify that an amicus brief is due "within the *initial* briefing period (*see* § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports." 29 C.F.R. § 2700.74. Prior to the November 8, 1999 amendment, it was unclear whether the amicus brief could be filed as late as the deadline for filing the reply brief. *See* 29 C.F.R. § 2700.74(b) (1998).

The CWU's amicus brief was not timely filed under Rule 74. Although the CWU's position is not identical to the Secretary's position in this matter, both the Secretary and the CWU seek to overturn the judge's decision. Consequently, we treat the CWU's position as more closely aligned with the Secretary's than with the operator's. Thus, the CWU was required to file its amicus brief within the Secretary's initial briefing period, which ended on January 24, 2000, 30 days after the Commission's direction for review. The CWU did not file its brief until January 27, three days late. In addition, the CWU did not file a motion for extension of time under Commission Procedural Rule 75(c), 29 C.F.R. § 2700.75(c).

Commission Procedural Rule 75(d), governing briefs, states that the Commission "*may* decline to accept a brief that is not timely filed." 29 C.F.R. § 2700.75(d) (emphasis added). We have been liberal in granting amicus status. *See, e.g., Peabody Coal Co.*, 18 FMSHRC 494, 497 (Apr. 1996). We have also frequently granted extensions of time to file briefs. The CWU's failure to timely file its brief, and a motion for extension of time, may be attributable to the recent change in our procedural rules.

Under these circumstances, we grant the CWU's motion to participate as amicus curiae, and accept its late-filed amicus brief.

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<sup>3</sup> Commissioner Marks would grant the CWU's motion to intervene.

Our decision in this matter may affect the manner in which the Secretary will be permitted to sample for respirable dust. To this end, we invite any interested organizations or persons to file motions for leave to participate as amici and amicus briefs in this matter. Any motions and amicus briefs submitted shall be filed no later than 30 days from the date of this order and, pursuant to Commission Procedural Rule 75(c), shall not exceed 25 pages. 29 C.F.R. § 2700.75(c). We hereby toll the time for parties to respond to the CWU's brief pending further Commission order.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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